

A **AKBERDIN HJ ABDUL KADER**

v.

TITIAN DESA SDN BHD & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
SITI KHADIJAH S HASSAN BADJENID JC
[SUIT NO: S-22-808-2010]
3 NOVEMBER 2014

C **LEGAL PROFESSION:** *Advocates and solicitors - Remuneration - Counsel's fees - Counsel acted for company - Counsel's retainer extended to negotiate settlement - Whether amount of payment for handling of legal suit and out of court settlement agreed by parties - Whether letter of undertaking of proposed remuneration had legal effect - Whether counsel obtained settlement and acted within mandate - Whether directors guaranteed payment in the event company was unable to pay - Legal Profession Act 1976, s. 121(1) - Applicability of*

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COMPANY LAW: *Directors - Guarantee - Liability - Whether directors guaranteed payment in the event company was unable to pay - Whether directors used separate personalities of company to evade obligation - Whether corporate veil should be pierced to impose liability*

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The plaintiff, an advocate and solicitor, was engaged by the first defendant to act against SSS Construction Sdn Bhd in a High Court suit in 2007 ('High Court Suit'). The second defendant and the third defendant were the directors of the first defendant who had guaranteed payment in case of any default in the payment of the plaintiff's fees. On instructions from the first defendant the plaintiff had acted as counsel for the first defendant in the High Court Suit 2007 and was claiming his legal fees amounting to RM5,560,000 under s. 121(1) of the Legal Profession Act 1976 which the defendants denied and refused to pay. According to the defendants the fees that were initially agreed upon was RM50,000 which was eventually paid in full.

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Consequently, the fees which were claimed in this action pertained only to the negotiations for a settlement of the High Court Suit. It was in the course of obtaining the consent judgment that the plaintiff's retainer was extended by the first defendant to negotiate for a settlement with the intention of bringing an end to the entire High Court Suit. It was the plaintiff's case that it was the second defendant who had requested the plaintiff to continue to act for the first defendant in the rest of the suit. As payment of the

plaintiff's fee, the plaintiff contended that it was the second defendant who proposed a remuneration of 8% of the final sum they succeeded in obtaining from the High Court Suit. Therefore, the plaintiff submitted that the defendant had forwarded to the plaintiff a letter of undertaking dated 12 August 2009 ('D32') with the signature of the second defendant which promised such remuneration to show the plaintiff their commitment in engaging and remunerating the plaintiff for his services. However, the defendants argued that as there was no settlement attained by the plaintiff for the first defendant and that the plaintiff had acted against the mandate, the first defendant was not liable to settle plaintiff's fees and had terminated the plaintiff's services. Subsequently, the High Court Suit was withdrawn. The defendants also submitted that the defendants had never agreed to make payment of the sum of RM5,560,000 to the plaintiff for the handling of the legal suit and for the out of court settlement in relation to the High Suit. As such, the defendants sought, as counterclaims, declarations and orders to the effect that the alleged contingency agreement was null and void. Also, the defendants submitted that since the first defendant was the client of the plaintiff in the High Court Suit, the issue of payment of legal fees by the second and third defendants did not arise at all and the plaintiff's sole reliance on the oral evidence of PW1 and PW2 to prove a personal guarantee of RM5,560,000 was incredible and implausible. The issues that arose for determination *inter alia* were (i) whether the defendants had agreed to make payment of the sum of RM5,560,000 to the plaintiff for the handling of the legal suit and for the out of court settlement in relation to the High Court Suit; (ii) whether the second and third defendants had given a guarantee to make payment of the sum of RM5,560,000 to the plaintiff in the event that the first defendant was unable or failed to make such payment.

Held (allowing plaintiff's claim against first and second defendants; dismissing plaintiff's claim against third defendant with costs; dismissing first and second defendants' counterclaim against plaintiff with costs):

- (1) There were discussions between the parties about the plaintiff's remuneration in regard to his engagement in handling the High Court Suit and for the out of court settlement. The presence of the second defendant's signature on D32 indicated his contentment to the contents of the document which he

- A had signed. In the circumstances, D32 was an undertaking in both form and substance which was legally enforceable and binding as against the first defendant. Nonetheless in the circumstances, D32 was not a contingency arrangement but a useful guide in the calculation of plaintiff's fee for work done
- B in arriving at the settlement sum. (paras 15 & 18)
- (2) The calculation of payment for work done was based on an oral agreement for a fixed sum of RM5,560,000. The plaintiff was unable to explicitly and satisfactorily explain how this figure was derived at. Despite this fact, as work was done, there was nothing to stop the applicability of s. 121(1) of the Legal Profession Act 1976 as long as the provisos of the section and the requirements of the Act were fulfilled and complied with. (para 20)
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- D (3) On a balance of probabilities, the plaintiff had carried out his work and discharged his duties according to the second defendant's instructions. The 2007 High Court Suit was withdrawn after the plaintiff's termination and came to a close after the plaintiff undertook to represent the defendants. The High Court Suit was settled at an impressive settlement as a result of the plaintiff's negotiation skills. (paras 29 & 30)
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- (4) The oral evidence of PW1 and PW2 was insufficient to prove that the second and third defendants had given a guarantee to make good to the plaintiff his fee in case of default of payment by the first defendant. The second defendant held 50% of the shares of the first defendant and had the power of attorney over the remaining shares and absolute control of the first defendant company. The second defendant had full control of the first defendant and had been the alter ego of the first defendant. However, the first defendant made attempts to conceal his identity behind the corporate veil. The defendants avoided paying the plaintiff and were using the separate personalities of companies to enable them to deliberately evade their obligations to the plaintiff. Thus, there was a need to pierce the corporate veil of the first defendant and impose liability on the second defendant. (paras 32, 35, 36 & 38)
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Case(s) referred to:

Dato' HL Wrigglesworth v. Haji Zakaria Yusoff [1995] 3 CLJ 64 (*refd*)

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Legislation referred to:

Legal Profession Act 1976, s. 121(1)

For the plaintiff - Jagjit Singh (Abdul Shukor Ahmad, Rafie Shafie, Reza Rafie & Meor Hafiz with him); M/s Shukor Baljit & Partners

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For the defendants - James Khong (John Skelchy with him); M/s James Khong

Reported by Sandra Gabriel

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JUDGMENT

Siti Khadijah S Hassan Badjenid JC:

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Facts Of Case

[1] Plaintiff Mr Akberdin bin Haji Abdul Kader, an advocate and solicitor of the High Court of Malaya was initially the counsel engaged by the first defendant to act in the Kuala Lumpur High Court Civil Suit No S5-22-985-2007 ("High Court Suit") (between SSF Construction Sdn Bhd ("SSF") against the first defendant) in an injunction application to seek a mandatory order to compel SSF to provide documents for inspection by the first defendant. The second defendant (Dato Sari @ Shaari bin Majihin @ Mat Jihin) and third defendant (Datin Nor Aziah binti Budin) are directors of the first defendant company Titian Desa Sdn Bhd. On instructions from the first defendant, the plaintiff had continued to act as counsel for the first defendant in this High Court Suit in respect of which plaintiff is now claiming his said legal fee amounting to RM5,560,000 which the defendants are denying and had refused to pay.

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Plaintiff's Case

[2] The plaintiff's claim is that the defendants had agreed to pay him professional legal fee of RM5,560,000 for services rendered until full resolution of the High Court Suit. Plaintiff is also claiming against the second and third defendants who according to the plaintiff had guaranteed the payment in case of any default in the payment of the said fees.

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A Defendants' Case

B [3] According to the defendants initially the fee that was agreed between the plaintiff and the first defendant was RM50,000 for the conduct of the interlocutory injunction application which was eventually paid in full by cheques as pleaded at para. 6 of plaintiff's statement of claim. Consequently the fee which is claimed in this action pertain only to the negotiations for a settlement of the High Court Suit. As such the RM5,560,000 sought herein cannot include the work that was done up to the consent judgment in the injunction application.

D [4] It was in the course of obtaining the consent judgment that the plaintiff's retainer was extended by the first defendant to negotiate for a settlement with the intention of bringing an end to the entire High Court Suit. As there was no settlement attained by the plaintiff for the first defendant and that in fact the plaintiff had acted against the mandate, the first defendant is saying that it is not liable to settle plaintiff's fee.

E [5] As regards the calculation of plaintiff's fee it is the contention of the first defendant that it was premised on a figure of 8% of the settlement sum *vide* a letter of undertaking dated 12 August 2009 (D32). The defendants are now seeking as counterclaims declarations and orders to the effect that the alleged contingency agreement is null and void. As the plaintiff had failed to succeed in obtaining what it wanted, the first defendant is saying that it is not liable to settle plaintiff's fee.

G [6] The second and third defendants denied they had anything to do with the plaintiff or had given a guarantee to make payment of the sum of RM5,560,000 to the plaintiff under any circumstances.

Issues To Be Decided

H [7] Whether the defendants had agreed to make payment of the sum of RM5,560,000 to the plaintiff for the handling of the legal suit and for the out-of-court settlement (if any) in relation to the High Court Suit?;

I [8] Whether the second and third defendants had given a guarantee to make payment of the sum of RM5,560,000 to the plaintiff in the event that the first defendant is unable and/or fails to make such payment?

Assessment Of Facts And Findings**A**

Whether The Defendants Had Agreed To Make Payment Of The Sum Of RM5,560,000 To The Plaintiff For The Handling Of The Legal Suit And For The Out-Of-Court Settlement (If Any) In Relation To The High Court Suit?

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[9] Learned counsel for the defendants submitted that the defendants had never agreed to make payment of the sum of RM5,560,000 to the plaintiff for the handling of the legal suit and for the out-of-court settlement in relation to the High Court Suit.

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[10] Second defendant asserted that the fee agreed between the plaintiff and the first defendant was to be premised on a percentage of 8% of the settlement sum (to be agreed upon between SSF and the first defendant). On that premise the defendants vehemently denied of any agreement between them of a fixed sum of RM5,560,000 as legal fee for the plaintiff for handling the intended settlement.

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[11] Plaintiff's version is that at the meeting held on 10 August 2009 the second defendant who was all along acting for the first defendant, and who was impressed by the plaintiff's performance and success in the injunction application, had requested the plaintiff to continue to act for the first defendant in the rest of the suit. As payment of the plaintiff's fee, it was the second defendant who proposed a remuneration of 8% of the final sum they succeeded in obtaining from the High Court Suit.

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[12] On this subject the plaintiff informed the court that the defendants had forwarded to him a letter of undertaking dated 12 August 2009 (D32) which promised such remuneration to show the plaintiff their commitment in engaging and remunerating the plaintiff for his services. According to the plaintiff he had refused to accept this arrangement being illegal and for that reason had refused to sign it. It is not in dispute that the second defendant had signed this letter of undertaking.

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[13] According to plaintiff's evidence flowing from the discussion plaintiff had decided to use the amount in the counterclaim of RM67,000,000 as the basis of the calculation, calculated 8% of it (including 5% service tax on top of RM5,560,000), disbursements, and added a RM100,000 discount into the agreed fee to which the first defendant had agreed.

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- A [14] It is the plaintiff's contention that the good relationship that had developed between them and plaintiff's trust in the defendants that the plaintiff did not reduce the agreed fee into writing. It was on this basis that according to the plaintiff they had issued the invoice only after the defendants had failed to pay the agreed fee.
- B For these reasons the plaintiff is now claiming from the defendants the agreed fee under s. 121(1) of the Legal Profession Act 1976 that provides as follows:

- C Where the remuneration of an advocate and solicitor in respect of contentious business done by him is not the subject of an agreement made pursuant to section 116, the solicitor's bill of costs may at the option of the advocate and solicitor either contain detailed items or be for a gross sum:

Provided that:

- D (a) ...
- (b) Where an action is commenced on a gross bill, the Court shall, if so requested by the party chargeable therewith before the expiration of one month from the service on that party of the writ or other originating process, order that the bill shall be taxed;
- E (c) ...

- F [15] In support of this contention learned counsel for the plaintiff had cited the case of *Dato' HL Wrigglesworth v. Haji Zakaria Yusoff* [1995] 3 CLJ 64 wherein the High Court had held as follows:

- G To my mind the wordings of s. 116 are clear. Section 116 is not a mandatory provision requiring the agreement to be reduced to writing - it merely says that the solicitor may make an agreement in writing and to make it binding, the client is required to sign it. If, however, for some reasons the agreement is not reduced to writing, it does not totally shut out the solicitor from claiming his costs for he can still fall back on s. 121(1). In so doing the onus of proving that the costs are fair and reasonable, as usual, is on him unless it is a gross sum bill. He cannot avail himself of whatever benefits conferred by s. 117. The avenues as created by
- H s. 121(1) give the solicitor the right of option, whether to present a bill containing detailed items or a gross sum bill.

- I [16] From the events that took place and evidence thus far I am satisfied that there were discussions between the parties about the plaintiff's remuneration in regard to his engagement in handling the High Court Suit and for the out-of-court settlement which the

plaintiff was to work out with SSF's counsel. As to the method of calculation of plaintiff's fee, which has been in dispute, it is a matter of the words of one witness against that of another. While plaintiff is a lawyer, the second defendant who has been representing the first defendant, is a successful businessman blessed with business acumen yet steadfast in his views. He is not one who could easily be swayed or swindled, bullied or manipulated. That is my assessment and impression of the second defendant after hearing and watching him in court.

[17] Despite their controversies, neither is disputing the existence of the letter of undertaking. According to the second defendant the fact that this letter of undertaking was prepared by the plaintiff and signed by him on behalf of the first defendant, explains why there was simply no other fees that were agreed upon other than the agreed percentage of 8%.

[18] From the evidence, however, I find nothing to show plaintiff's involvement in the preparation of this document. What is left for the court to consider is the presence of second defendant's signature on the said letter of undertaking (D32) indicating his contentment to the content of the document which he had signed.

[19] In the circumstances I agree with the submissions of learned counsel for the defendants at para. 15.1 of defendants' post trial submissions in reply that this document (D32) is an undertaking in both form and substance which is legally enforceable and binding as against the first defendant. Nonetheless in the circumstances of this case I am not accepting it as a contingency arrangement but a useful guide in the calculation of plaintiff's fee for work done in arriving at the settlement sum.

[20] Though I am satisfied that work was done by the plaintiff for the benefit of the defendants, I am dismissing plaintiff's contention as unproven, that the calculation of payment for work done was based on an oral agreement between them of a fixed sum of RM5,560,000. I find that the plaintiff was unable to explicitly and satisfactorily explain to this court how this figure was derived at, at the time the agreement was alleged to have been made before ascertaining the settlement sum. Despite this fact as work was done, in my considered opinion there is nothing to stop the applicability of s. 121(1) of the Legal Profession Act 1967 as long as the *provisos* of this section and the requirements of the Act are fulfilled and complied with.

- A *The Second Defendant Denied Of Any Settlement Said To Have Been Attained By The Plaintiff, On The Other Hand Claimed That The Plaintiff Had Acted Contrary To His Expressed Instructions In Relation To The Negotiations For Settlement*
- B [21] According to the facts and evidence, on taking up the matter plaintiff had no fixed mandate of negotiations. Initially the plaintiff's focus was on defending the first defendant against the claim and/or pursuing a counterclaim based on the sum that was pleaded in the cause papers. Subsequently, however, there were numerous mandates from the second defendant for the plaintiff to negotiate
- C for a settlement and the plaintiff had proceeded to conduct the negotiations. Consequently letters were exchanged between the plaintiff and SSF's counsel with the view of obtaining a settlement between the parties they were representing.
- D [22] Referring to a letter dated 17 September 2009 (P9) plaintiff had drawn the attention of the court to the offer letter from SSF's counsel to settle the entire suit. The proposal was to settle the alternative prayer which the first defendant had pleaded for in the counterclaim against SSF which was a claim for
- E RM58,000,000 + profit. As at 17 September 2009, though the plaintiff had succeeded in procuring the settlement offer from SSF, it did not come through as SSF could not accept the second defendant's request that the 50% profit be paid to the first defendant within one month after CF was issued.
- F [23] As negotiations continued the next offer that the plaintiff was able to secure from SSF was RM67,000,000 which was the amount pleaded in the first prayer of the first defendant's counterclaim in the High Court Suit. As at 13 October 2009 the
- G plaintiff had succeeded in securing both the claims sought by the first defendant. P13 to P16 are, however, letters signed by the second defendant (all dated 14 October 2009) giving mandates to the plaintiff to start negotiating with SSF's counsel for a higher sum of RM80,000,000 and should the need arises, a downward trend not lower than RM70,000,000.
- H [24] By a letter dated 27 October 2009 (P18) SSF had increased their offer to RM68,000,000. P19 is a letter issued on 29 October 2009 by the plaintiff stating that the settlement is to be reached at RM75,000,000. P20 dated 10 November 2009 was issued by
- I SSF's counsel to state that they could only settle at

RM68,500,000. By a letter dated 16 November 2009 (P21) the plaintiff wrote to the first defendant to inform that SSF had proposed to settle for RM69,500,000.

[25] From plaintiff's evidence he had received this offer (to settle at RM69,500,000) from SSF *via* phone to which defendants were disputing as being wholly unsubstantiated and contended that if true it would have been in writing. This demand by the defendants of having the offer made in writing before it could be considered to be true was criticised by the plaintiff as an unusual event in the ordinary course of defendants' business with the plaintiff. As this had never happened before the plaintiff had faulted the defendants as having a reason in suddenly making such a strange request.

[26] *Vide* a letter dated 17 November 2009 (P22) to SSF's counsel plaintiff offered to settle at RM70,000,000 and had waited for a response from SSF's counsel. Shortly after that ie, on 20 November 2009 plaintiff received a letter dated 4 November 2009 (D39 - which according to the plaintiff was backdated) from the defendants that revoked all previous letters dated 14 October 2009 signed by the second defendant that gave mandates to the plaintiff, and asked plaintiff to start negotiating for a higher settlement sum of RM75,000,000 and above.

[27] By a letter dated 23 November 2009 (D40) the first defendant informed the plaintiff that in the mean time it had still not received any confirmation of SSF with regard to the sum of RM69,500,000, and the mandate of RM75,000,000 was again repeated by the second defendant. By a letter dated 7 December 2009 (D34) plaintiff had informed the defendants that he had attained a settlement offer of RM68,500,000 from SSF. Hardly two weeks after that, by a letter from the defendants dated 18 December 2009 (D41) plaintiff's services was terminated on the grounds that the plaintiff had failed to settle the High Court Suit according to first defendant's instructions. Not long after plaintiff's termination, that is on 14 January 2010 the High Court Suit was successfully withdrawn (D35).

[28] The reason given by the plaintiff as to why the defendants had alleged failure by him and had revoked their previous mandates to him was because the defendants knew that plaintiff had achieved the settlement sought but with a view of avoiding to bear his fee, and that this is borne out by the following evidence:

A Q: I put it to you that you sent the letter Exhibit D39 because you indicated to Encik Akberdin the minimum you had instructed RM70,000,000.00 + RM5,000,000.00 which is his fees. You indicated you wanted minimum RM70,000,000.00 tambah lagi RM5,000,000.00 for his fees.

B A: Tak setuju.

[29] As far as the court is concerned there is ample evidence upon which I am satisfied on a balance of probabilities that the plaintiff had carried out his work and discharged his duties in line with the second defendant's instructions that secured the highest settlement sum the defendants could possibly attain in the negotiation with SSF. There is absolutely no evidence that the High Court Suit had proceeded to trial indicating that the long drawn controversies between the disputing parties had reached an early closure. The 2007 High Court Suit was withdrawn hardly a month after plaintiff's termination. It is observed that the matter came to a close on 14 January 2010 hardly about five months after the plaintiff undertook to represent the defendants from 10 August 2009. All these had happened against the backdrop of an acrimonious relationship the defendants had with SSF since 2007 before plaintiff's involvement in the negotiation with SSF.

[30] Based on the evidence, facts and circumstances as well as the events that followed and on a balance of probabilities, my finding is that the High Court Suit was settled at a sum not lower than RM68,500,000 which was made possible by the plaintiff's effort and negotiation skills.

Whether The Second And Third Defendants Had Given A Guarantee To Make Payment Of The Sum Of RM5,560,000 To The Plaintiff In The Event That The first Defendant Is Unable And/Or Fails To Make Such Payment?

[31] Learned counsel for the defendants submitted that only the first defendant was the client of the plaintiff in the High Court Suit. In the circumstances the issue of payment of legal fee by the second and third defendants does not arise at all. This is said to be based on grounds that the second and third defendants were not named as parties in the High Court Suit; that the plaintiff never represented them nor rendered any legal services to them; that there is no written guarantee or any record of any guarantee by them; that there is no evidence of any agreed fee; that there

is no exact date as to when the personal guarantees were purportedly given; that there is no evidence as to terms of personal guarantees; that no demand was made to the second and third defendants under any personal guarantee before this suit was filed; and that the plaintiff was solely relying on the oral evidence of PW1 and PW2 to prove a personal guarantee of RM5,560,000 which the defendants described as incredible and implausible. The second and third defendants strongly maintained their contention that they had never given a guarantee to make payment of such a sum to the plaintiff under any circumstances.

[32] As regards the oral evidence of PW1 and PW2 (which the plaintiff is solely relying on to prove this issue) I find it as insufficient to prove that the second and third defendants had given a guarantee to make good to the plaintiff his large fee in case of default of payment by the first defendant. This is especially so considering the court's earlier finding that the plaintiff has failed to prove that there was indeed such an agreement between the parties of the so-called agreed legal fee of RM5,560,000.

[33] Learned counsel for the defendants had also submitted that, 'there is no reason to pierce the corporate veil as the client-solicitor relationship is purely between the plaintiff and the first defendant. In any event, even if the corporate veil of the first defendant is pierced to show that the second defendant is in fact the alter ego of the first defendant, a personal guarantee does not exist merely because of alter egos ...'.

[34] In the course of trial, however, I discovered ample evidence to show that the second defendant was the mind and the will of the first defendant. On this aspect I agree with the submission of learned counsel for the plaintiff that the second defendant was in fact the mastermind that drove the will of the first defendant. I have no doubt that the second defendant was the one and only one who gave the plaintiff all the instructions. From the beginning it was the second defendant that put down his personal signatures on all the mandates of offers of settlement given to the plaintiff. I am satisfied that the second defendant has been and is the alter ego of the first defendant.

[35] It is an undisputed fact that the second defendant held 50% of the shares of the first defendant. Though the balance of the shares is dividedly held by his wife, the third defendant, and their

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- A children, the second defendant has power of attorney over the remaining 50% of the shares, and has absolute control of the first defendant's company. Payments of cheques issued to the plaintiff were all made directly from the second defendant's account. Evidence clearly shows the second defendant as the one, and the
- B only person actively dealing for the company. I find that the second defendant who has full control of the first defendant is making attempts to conceal his identity behind the corporate veil.

- C [36] On a balance of probabilities I find that the plaintiff has proven his legal rights as against the first and second defendants whom I find had committed wrongdoings in terminating plaintiff's services. This was done at a crucial stage just shortly before the closure of the 2007 High Court Suit. On the facts it is apparent to this court that this was done by the defendants to simply avoid
- D paying the plaintiff the 'big fee' which the defendants had earlier confidently promised to pay the plaintiff for his services.

- E [37] The attractive offer was an incentive to put the plaintiff on his toes and to aggressively and quickly pursue the defendants' mission in securing full resolution of the High Court Suit together with the biggest settlement sum plaintiff could possibly secure for the defendants. The second defendant had given evidence in court that he wanted the settlement sum be paid to him as quickly as possible. It is observed that the High Court Suit came to its
- F closure about five months from the time plaintiff undertook to represent the defendants.

- G [38] Quite apart from the requirement of justice be done to the aggrieved party whose right is proven to have been violated, it has also become obvious to this court that the defendants are using the separate personalities of companies to enable them to deliberately evade their obligations to the plaintiff. In the circumstances I find the need for this court to pierce the corporate veil of the first defendant and impose liability on the second defendant who has full and absolute control of the first
- H defendant.

- I [39] In view of the foregoing and on a balance of probabilities, I find that the plaintiff has proven his claim against the first and the second defendants. I therefore enter judgment for the plaintiff as follows: first defendant and second defendant to pay the plaintiff

his (promised fee) in the amount equivalent to 8% of RM68,500,000 at an interest of 5% per annum from the date of judgment till realisation of the judgment sum; I dismiss first defendant and second defendant's counterclaim against the plaintiff; I am allowing costs of RM10,000 to the plaintiff. Further I dismiss plaintiff's claim against the third defendant with costs of RM5,000 to be paid to her by the plaintiff.

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